SUPREME COURT, U. S.

JAN 30 1969

JOHN F. DAVIS, CLERK

IN THE

# Supreme Court of the United States

October Term, 1968

No. 997

---

ARLAM CARR, JR., a Minor, by Arlam Carr and Johnnie Carr, his parents and next friends, et al.,

*Petitioners,*

v.

MONTGOMERY COUNTY BOARD OF EDUCATION, et al.

---

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

---

FRED D. GRAY
SOLOMON S. SEAY, JR.
GRAY, SEAY, LANGFORD & PRYOR
352 Dexter Avenue
Montgomery, Alabama 36104

JACK GREENBERG
JAMES M. NABRIT, III
FRANKLIN E. WHITE
ELIZABETH B. DUBOIS
MELVYN ZARR
10 Columbus Circle
New York, New York 10019

*Attorneys for Petitioners*

# INDEX


| | PAGE |
|---|---|
| Opinions Below | 1 |
| Jurisdiction | 2 |
| Question Presented | 3 |
| Constitutional Provisions Involved | 3 |
| Statement | 4 |
| 1. Introduction | 4 |
| 2. Proceedings during 1964 | 4 |
| 3. Proceedings during 1965 | 5 |
| 4. Proceedings during 1966 | 6 |
| 5. Proceedings during 1967 | 7 |
| 6. Proceedings during 1968 | 11 |
| a. In the District Court | 11 |
| b. Action of the Court of Appeals | 15 |
| Reasons for Granting the Writ | 16 |
| Conclusion | 25 |


## Table of Cases


Bradley v. School Board, 382 U.S. 103 ..... 6, 18

Brown v. Board of Education, 347 U.S. 483 ..... 5, 16, 17

Brown v. Board of Education, 349 U.S. 294 ..... 16

Coppedge v. Franklin County Board of Education, 273 F. Supp. 289 (E.D. N.C. 1967), aff'd 294 F.2d 410 (4th Cir. 1968) ..... 23

PAGE

Davis v. Board of School Commissioners of Mobile County, 364 F.2d 896 (5th Cir. 1966) ..... 7

Dowell v. School Board of Oklahoma City Public Schools, 244 F. Supp. 971 (W.D. Okla. 1965), aff'd 375 F.2d 158 (10th Cir. 1967), cert. denied, 387 U.S. 931 ..... 23, 24

Green v. County School Board of New Kent County, 391 U.S. 430 ..... 16, 17, 22

Griffin v. School Board, 377 U.S. 218 ..... 18

Kelley v. Altheimer School District, 378 F.2d 483 (8th Cir. 1967) ..... 23

Kier v. County School Board of Augusta County, 249 F. Supp. 239 (W.D. Va. 1966) ..... 23

Lee v. Macon County Board of Education, 267 F. Supp. 458 (M.D. Ala. 1967), *aff'd sub nom.* Wallace v. United States, 389 U.S. 215 (1967) ..... 7, 8, 19, 21

Raney v. Board of Education of the Gould School District, 391 U.S. 443 ..... 24

Rogers v. Paul, 382 U.S. 198 ..... 6, 18

United States v. Board of Education of City of Bessemer, 396 F.2d 44 (5th Cir. 1968) ..... 17

United States v. Jefferson County Board of Education, 372 F.2d 836 (5th Cir. 1966), *aff'd en banc,* 380 F.2d 385 (5th Cir. 1967), *cert. denied,* 389 U.S. 840 ..... 7, 8, 24

United States v. School District 151 of Cook County, Illinois, 286 F. Supp. 786 (N.D. Ill. 1968), *aff'd,* —— F.2d —— (7th Cir., Dec. 17, 1968), 37 U.S.L. Week 2371 ..... 23

Wallace v. United States, 389 U.S. 215 ..... 8, 16, 19, 22

Wanner v. County School Board of Arlington County, Va., 357 F.2d 452 (4th Cir. 1966) ..... 24

Yarbrough v. Hulbert-West Memphis School District, 380 F.2d 962 (8th Cir. 1967) ..... 23

IN THE

# Supreme Court of the United States

October Term, 1968

No. .....

---

ARLAM CARR, JR., a Minor, by Arlam Carr and Johnnie Carr, his parents and next friends, et al.,

*Petitioners,*

v.

MONTGOMERY COUNTY BOARD OF EDUCATION, et al.

---

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above-entitled case on August 1, 1968, and rehearing denied on November 1, 1968.[1]

### Opinions Below

The opinion and order of the district court of February 24, 1968 (R. 404), is reported at 289 F. Supp. 647 (Appendix A)[2] and the supplemental order entered March 2, 1968 (R. 430), is at 289 F. Supp. 657 (Appendix B). Another

---

[1] A petition for certiorari to review the same judgment has been filed by the United States in this Court with the record herein *sub nom. United States* v. *Montgomery County Board of Education*, No. 798, Oct. Term, 1968.

[2] Citations to the Appendix refer to the Appendices to the Petition filed in this Court by the United States in No. 798, Oct. Term, 1968.

supplemental order of March 2, 1968 (R. 428), is unreported (Appendix C). The majority opinion of August 1, 1968, by the panel of the Court of Appeals (by Circuit Judge Gewin, with District Judge Elliott concurring) is reported at 400 F.2d 1 (Appendix D). The dissenting opinion of October 21, 1968, by Judge Thornberry is reported at 402 F.2d 782 (Appendix E). The order of the Court of Appeals of November 1, 1968, denying rehearing and rehearing *en banc* by an equally divided court, is at 402 F.2d 784 (Appendix F). The opinion dissenting from the denial of rehearing *en banc* (by Chief Judge Brown, with the concurrence of Judges Wisdom, Thornberry, Goldberg and Simpson) is at 402 F.2d 784 (Appendix F). Judge Dyer also dissented from the denial of rehearing *en banc* without opinion at 402 F.2d 787.

Prior reported opinions and orders of the district court at earlier stages of the case are reported as follows: (a) July 31, 1964, 232 F. Supp. 705, R. 98; (b) May 18, 1965, 10 Race Rel. L. Rep. 582, R. 191; (c) March 22, 1966, 253 F. Supp. 306, R. 274; (d) August 18, 1966, 11 Race Rel. L. Rep. 1716, R. 285; (e) June 1, 1967, 12 Race Rel. L. Rep. 1200, R. 364.

## Jurisdiction

The judgment of the Court of Appeals was entered on August 1, 1968 (Appendix D); rehearing was denied November 1, 1968 (Appendix F). The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

## Question Presented

Whether in a school district segregated by law into a dual system of separate white and Negro schools, where only slight desegregation has been achieved despite litigation begun in 1964, and a trial court determined that to "pass tokenism" the faculty desegregation goal should be to distribute teachers so that all schools will have about the same proportion of white and Negro teachers, it was error for the Court of Appeals to:

(a) strike down the trial court's numerical ratios as the proper long-term faculty integration objective and leave the goal undefined;

(b) refuse to set a target date or timetable for full faculty desegregation;

(c) dilute the trial judge's interim minimum goals by adding qualifying phrases which enable the school board to excuse noncompliance;

(d) reject the petitioners' request that all faculties in new schools be fully desegregated when they are opened.

## Constitutional Provisions Involved

This case involves the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States.

## Statement

### 1. Introduction.

This is a public school desegregation suit presenting issues relating to the obligation of the Montgomery County, Alabama, public school system to desegregate school faculties. The school board appealed seeking reversal of a desegregation order entered February 24, 1968, and amended March 2, 1968, by District Judge Frank M. Johnson, Jr. By a vote of 2-1, a panel of the Court of Appeals (Circuit Judge Gewin and District Judge Elliott) modified the order and eliminated certain provisions relating to faculty desegregation. Circuit Judge Thornberry dissented from the modifications of the faculty integration order. A petition for rehearing *en banc* was denied by an equally divided vote of 6-6, with one Judge not participating due to illness.

In this petition, the Negro pupils and parents who commenced the litigation in 1964 seek to reinstate the district court order on the faculty question. Another petition for certiorari seeking that same relief has been filed by the United States which has participated in the case throughout by order of the District Court. See *United States* v. *Montgomery County Board of Education,* docketed December 4, 1968, as No. 798, October Term, 1968.

### 2. Proceedings During 1964.

The complaint (R. 1-8), filed by a group of Negro pupils and parents May 11, 1964, alleged that the Montgomery County, Alabama school system was operated on a racially segregated basis. It was alleged that Negro students were assigned to schools with only Negro students and faculties (R. 4). The relief sought included an injunction against segregated faculty assignments (R. 7).

An opinion by the district court July 31, 1964, noted that the system, which embraces the City of Montgomery and surrounding rural areas, served about 25,000 white children and 15,000 Negro children (R. 100). The judge found there was "a dual school system based upon race and color" and that defendants "operate one set of schools to be attended exclusively by Negro students and one set of schools to be attended exclusively by white students" (R. 100). The judge wrote that: "The evidence further reflects that the teachers are assigned according to race; Negro teachers are assigned only to schools attended by Negro students and white teachers are assigned only to schools attended by white students" (R. 100). The court observed: "Even the substitute teacher list and attendance records reflect these distinctions based upon race" (R. 101). Finding that ten years had elapsed since *Brown* v. *Board of Education*, 347 U.S. 483, without any action to desegregate the schools, the court ordered that desegregation begin in September 1964 in grades 1, 10, 11 and 12. But, the court made no order with respect to faculty integration. Thereafter, 29 Negro pupils sought transfers to white schools in September 1964. The school board, using the Alabama School Placement Law, denied the requests of 21 and admitted the remaining 8 Negroes to white schools (R. 112). The court refused to order the admission of the rejected Negro transfer applicants (R. 148).

**3. Proceedings During 1965.**

On January 15, 1965, the school board filed a proposed desegregation plan as required by the judge (R. 155). The proposed plan made no mention of faculty desegregation and plaintiffs objected on that ground among others (R. 169). On May 18, 1965, the trial judge approved the proposed plan with amendments to require desegregation

in grades 1, 2, 9, 10, 11 and 12 in September 1965 (R. 191). Again the court entered no order with respect to faculty desegregation, but did order that a plan for "complete elimination of the biracial school system within a reasonable time" be filed in January 1966.[3]

In August 1965 the school board reported that it had accepted 18 of 49 Negro applicants to white schools (R. 195). The plaintiffs again objected to the denial of transfer requests, but the court upheld the board's denials of all except 6 applicants who were ordered admitted (R. 232-234).

**4. Proceedings During 1966.**

On January 14, 1966, the board filed another desegregation plan making no mention of faculty desegregation (R. 250). Again plaintiffs objected to the lack of faculty desegregation (R. 265) and this time the United States made a similar objection (R. 261). Plaintiffs specifically relied on this Court's faculty desegregation decisions in *Bradley* v. *School Board,* 382 U.S. 103 (Nov. 1965) and *Rogers* v. *Paul,* 382 U.S. 198 (Dec. 1965).

On March 22, 1966, the court entered another desegregation order (R. 274), this time requiring a "freedom of choice" plan generally following guidelines of the Department of Health, Education, and Welfare (HEW) (R. 270). This order required desegregation of all grades except 5

---

[3] In announcing his ruling from the Bench, May 5, 1965, Judge Johnson said: "The defendants should be ordered to file their plan for completion of the desegregated system, including abolition of the dual school or biracial school system, which of course still exists. I am not naive enough to believe that desegregation of certain grades by transfer, such as we are doing here, is full compliance with what the law eventually envisions and requires, but I recognize that it is a transition period, and I think that this is reasonable for the facts in this case and the circumstances existing in this particular school district at this time" (R. 444).

and 6 in September 1966, and for those grades to be desegregated in September 1967. It directed the closing of several small, inadequate all-Negro schools.

For the first time, the March 22, 1966, order also required faculty desegregation. It ruled that race and color was not to be a factor in faculty assignments except to eliminate the effects of past discrimination. It ordered that assignments be made so that each school's "faculty . . . is not composed of members of one race." Job applicants were ordered to be informed of the new policy, and the administration was ordered to encourage staff transfers to promote integration. The school administration, in response, made tentative arrangements to place 4 white teachers in black schools and 4 black teachers in white schools (R. 455). However, after these plans were made, the trial judge, on his own motion on August 18, 1966, rescinded the requirement and postponed faculty integration another year (R. 285). The judge relied on a Fifth Circuit opinion which ordered faculty integration for Mobile, Alabama to begin in 1967.[4]

**5. Proceedings During 1967.**

On April 11, 1967, plaintiffs moved for modification of the desegregation plan to conform to the circuit-wide requirements of *United States* v. *Jefferson County Board of Education*, 372 F.2d 836 (5th Cir. 1966), *aff'd en banc*, 380 F.2d 385 (5th Cir. 1967), *cert. denied*, 389 U.S. 840 (1967). Judge Johnson ordered the board to show cause why it should not adopt a plan to conform to *Jefferson, supra*, and to the plan ordered by a three-judge court for 99 Alabama counties in *Lee* v. *Macon County Board of Education*, 267 F. Supp. 458

---

[4] *Davis* v. *Board of School Commissioners of Mobile*, 364 F.2d 896 (5th Cir., 1966).

(M.D. Ala. 1967), *aff'd sub nom. Wallace* v. *United States*, 389 U.S. 215 (1967).[5]

On June 1, 1967, the court entered an order conformable to *Jefferson, supra*, and *Lee, supra* (R. 364). The provision for faculty desegregation, which is quoted in full in the footnote below,[6] adopted the objective that "the pattern of

---

[5] The *Lee* opinion recites in detail the background of official resistance by the Governor of Alabama and state education officials to prevent public school desegregation in the State. The three-judge court found that the desegregation efforts of Negroes in Alabama "have met the relentless opposition of these defendant state officials" (267 F. Supp. at 465; R. 318). The opinion recites in detail one series of episodes in August 1966 when the State Superintendent of Education and Governor George C. Wallace worked to prevent faculty desegregation in Tuscaloosa County (267 F. Supp. at 469). The court found that these "state officials also made it clear that similar measures would be taken in other communities if Negro teachers were assigned to teach white students" (*id.*).

[6] "VI

"FACULTY AND STAFF

"A. *Faculty Employment and Assignment.* Race or color will not be a factor in the hiring, assignment, reassignment, promotion, demotion or dismissal of teachers and other professional staff members, including student teachers, except that race will be taken into account for the purpose of counteracting or correcting the effect of the past segregated assignment of teachers in the dual system. Teachers, principals, and staff members will be assigned to schools so that the faculty and staff is not composed exclusively of members of one race. Wherever possible, teachers will be assigned so that more than one teacher of the minority race (white or Negro) will be on a desegregated faculty. The school board will take positive and affirmative steps to accomplish the desegregation of its school faculties, including substantial desegregation of faculties in as many of the schools as possible for the 1967-68 school year, notwithstanding that teacher contracts for the 1967-68 or 1968-69 school year have already been signed and approved. The objective of the school system is that the pattern of teacher assignment to any particular school shall not be identifiable as tailored for a heavy concentration of either Negro or white pupils in the school. The school system will accomplish faculty desegregation in a manner whereby the abilities, experience, specialties, and other qualifications of both white and Negro teachers in the system will be, insofar as administratively

teacher assignment to any particular school shall not be identifiable as tailored for a heavy concentration of either Negro or white pupils in the school" (R. 370).

On August 17, 1967, the United States filed a motion to require further faculty desegregation in view of the fact that the school board planned to assign only 5 white teachers of 804 to two Negro high schools and 5 Negro teachers out of 554 to two predominantly white high schools (R. 376). The plaintiffs joined in the motion (R. 379), and the court held an evidentiary hearing September 5, 1967.

---

feasible, distributed evenly among the various schools of the system.

"B. *Dismissals.* Teachers and other professional staff members will not be discriminatorily assigned, dismissed, demoted, or passed over for retention, promotion, or rehiring on the ground of race or color. In any instance where one or more teachers or other professional staff members are to be displaced as a result of desegregation, no staff vacancy in the school system will be filled through recruitment from outside the system unless no such displaced staff member is qualified to fill the vacancy. If, as a result of desegregation, there is to be a reduction in the total professional staff of the school system, the qualifications of all staff members in the system will be evaluated in selecting the staff member to be released without consideration of race or color. A report containing any such proposed dismissals, and the reasons therefor, shall be filed with the Court, and copies served upon opposing counsel within five (5) days after such dismissal, demotion, etc., is proposed.

"C. *Notice to New Staff Members.* In the recruitment and employment of teachers and other professional personnel, all applicants or other prospective employees will be informed that Montgomery County operates a racially desegregated school system and that members of its staff are subject to assignment in the best interest of the system and without regard to the race or color of the particular employee.

"D. *Encouragement of Voluntary Faculty Tranfers.* The Superintendent of Schools and his staff will take affirmative steps to solicit and encourage teachers presently employed to accept transfers to schools in which the majority of the faculty members are of a race different from that of the teacher to be transferred."

School Superintendent McKee testified that it was decided to limit faculty desegregation at the beginning to high schools because he anticipated less objection since one teacher would not have the pupils for as much of the day in high school classes (R. 459-460). He also decided to integrate faculties only in schools within the city limits because of the need for close supervision and special protection which was more difficult in sparsely settled areas of the county (R. 461). The superintendent said he was having some difficulty finding white teachers who would agree to assignments in Negro schools, although there was no difficulty finding Negroes willing to teach in white schools (R. 466, 469, 470). The superintendent had engaged 12 or 13 white teachers for Negro schools, but only 5 of them actually finally accepted the assignment (R. 468). All 5 Negroes initially picked for white schools actually undertook such assignments (R. 468-469). Mr. McKee indicated that he had not assigned more Negro teachers, even though they were available, because he had not been able to get more whites to volunteer for assignments to Negro schools (R. 469), and he wanted to keep the number of Negroes and whites in balance (R. 481). The annual faculty turnover or replacement rate in Montgomery is about 10% of the total staff (R. 478).

At the end of the hearing the court heard arguments, but took no action to make a ruling to affect the 1967-68 school year. The matter was kept under advisement without action by the court. During argument the judge made it plain that he had little "sympathy" with the request for relief at that time (R. 484).

**6. Proceedings During 1968.**

a. *In the District Court.* On February 1, 1968, the board filed a further pleading asserting it had 32 faculty employees teaching in schools predominantly of the other race, and that it planned further efforts for the coming year. The United States filed a motion (R. 389), joined by the private plaintiffs (R. 394), seeking further relief on the faculty question as well as relief on several other issues affecting desegregation. The court heard evidence February 9, 1968 (R. 495-694).

Superintendent McKee and Associate Superintendent Garrett testified that they had decided that in September 1968 they would assign Negro teachers to all of the white schools at once in "one fell swoop" (R. 556, 579). Mr. Garrett described the plans for faculty desegregation in the following testimony:

> Q. How many teachers do you estimate you will have in minority situations this coming year? A. Well, we have about thirty-five now. We are going to attempt—our plan is to try to get at least one into every junior high and every elementary, and then start—once we accomplish that, start around with the second one and the third one and so on, rather than to have three in one school and none in another.
>
> Q. Well based on your— A. Roughly speaking, a minimum or—with thirty-five already there, we have fifty schools or thereabouts; I would say about a hundred or better.
>
> Q. Based on your— A. I think that is practical; I believe we can accomplish that (R. 584).
>
> • • •
>
> The Court: My understanding, now, you are going to have this next year teachers of the minority race in every school in your system?

Witness: As far as humanly possible.

The Court: And how many do you expect to have in your—in your elementary schools, a minimum per school?

Witness: Two, at least.

The Court: And how many in your junior high, your minimum?

Witness: Two; maybe more.

The Court: All right.

Witness: Depending on what we come—

The Court: Now, let's go to percentages; what percentage do you expect to have in your high schools?

Witness: I just don't know. We haven't actually discussed that up to this point. I—I couldn't say.

The Court: Well, your race—your student population is sixty-forty?

Witness: Yes, sir.

The Court: Ultimately, that will be your optimum if you are going to eliminate the racial characteristics of your school through faculty—

Witness: (Nodded to indicate affirmative reply.)

The Court: —wouldn't it? It would have to be. (R. 598-599.)

• • •

Q. Mr. Garrett, I believe you testified when I was examining you that you were going to have at least—at least one in each school, or am I wrong on that? A. I said we would try to start with one in every elementary school and then come back around with two, and if we were successful, maybe three; I don't have any preconceived notion about maximums, but I would rather have these distributed rather than to have three, say, in one school and none in another (R. 600).

In a memorandum opinion filed February 24, 1968, the court made findings that there were still about 15,000 Negro children and 25,000 white children in the system; that only 550 Negro children were attending traditionally white schools and no whites were in the Negro schools under the freedom of choice plan; that 32 classroom teachers were teaching pupils in schools predominantly of the opposite race; that the system employed about 550 Negro teachers and 815 white teachers; that most faculty desegregation was in the high schools and there was little, if any, faculty desegregation in the county's rural schools (R. 406). The court also noted that the vast majority of teachers newly hired after the June 1, 1967, faculty desegregation order, were still assigned to schools where their race was in the majority; that no Negro has yet been a sustitute in a white school; that during a semester where white substitute teachers were employed 2,000 times, only 33 white substitutes were employed in Negro schools; that there was "no adequate program for the assignment of student teachers on a desegregated basis"; and that there was no faculty desegregation in night schools (R. 406-407). The court concluded: "The evidence does not reflect any real administrative problems involved in immediately desegregating the substitute teachers, the student teachers, the night school faculties, and in the evolvement of a really legally adequate program for the substantial desegregation of the faculties of all schools in the system commencing with the school year 1968-69" (R. 407).

Judge Johnson, during the hearing, in a colloquy with Superintendent McKee, expressed the position, "I have gone along with this transition business for a good long while, but we have passed the transition period" (R. 544). Finding that the board had "failed to discharge the affirmative duty . . . to eliminate the . . . dual school system," the court held

it was "necessary and entirely appropriate to establish now more specific requirements governing minimum amounts of progress in the future . . ." (R. 409).

The order of February 24, 1968 (R. 413-414), as amended (R. 429), supplemented the desegregation plan approved June 1, 1967. The order, which is quoted below,[7] defined the objective of eliminating the racial identifiability of school faculties as requiring the assignment of faculty such that the ratio of Negro to white faculty members in each school would be substantially the same throughout the

---

[7] "I

"FACULTY AND STAFF

"A. *Statement of Objective.* In achieving the objective of the school system, that the pattern of teacher assignments to any particular school shall not be identifiable as tailored for a heavy concentration of either Negro or white pupils in the school, the school board will be guided by the ratio of Negro to white faculty members in the school system as a whole.

"The school board will accomplish faculty desegregation by hiring and assigning faculty members so that in each school the ratio of white to Negro faculty members is substantially the same as it is throughout the system. At present, the ratio is approximately 3 to 2. This will be accomplished in accordance with the schedule set out below.

"B. *Schedule for Faculty Desegregation.* 1. 1968-69. At every school with fewer than 12 teachers, the board will have at least one full-time teacher whose race is different from the race of the majority of the faculty and staff members at the school.

"At every school with 12 or more teachers, the race of at least one of every six faculty and staff members will be different from the race of the majority of the faculty and staff members at the school. This Court will reserve, for the time being, other specific faculty and staff desegregation requirements for future years.

"C. *Means of Accomplishment.* If the school board is unable to achieve faculty desegregation by inducing voluntary transfers or by filing vacancies, then it will do so by the assignment and transfer of teachers from one school to another.

"D. *Substitute Teachers.* Commencing in September, 1968, with the 1968-69 school year, the ratio of the number of days taught by white substitute teachers to the number of days

system. For the year 1968-69 the court ordered at least one minority race (white or black) teacher in each school with less than 12 teachers, and in larger schools at least one minority race teacher of every six teachers. The court reserved judgment on detailed requirements for future years. The court also ordered that substitute teachers, student teachers, and night school teachers should be assigned so that there was substantially the same racial ratio in each school.

On the school board's application for a stay pending appeal, a part of the faculty desegregation order was stayed by Judge Johnson.

b. *Action of the Court of Appeals.* On August 1, 1968, the Court of Appeals, by a divided vote, modified the faculty desegregation order.[8] The court struck from the decree all numerical ratios except the interim 1968-69 goal—a five-to-one ratio in large schools and a more liberal ratio in smaller schools—which was modified to read *"substantially* or *approximately five to one"* (emphasis added). The court

---

taught by Negro substitute teachers at each school during each semester will be substantially the same as the ratio of white substitute teachers to Negro substitute teachers on the list of substitute teachers at the beginning of the semester.

"Commencing with the 1968-69 school year, the board will not use an individual as a substitute teacher in the Montgomery Public Schools if he will consent to substitute only at predominantly white schools or only at predominantly Negro schools.

"E. *Student Teachers.* Commencing in September, 1968, with the 1968-69 school year, the ratio of white to Negro student teachers each semester in each school that uses student teachers will be substantially the same as the ratio of white and Negro student teachers throughout the system.

"F. *Night Schools.* Commencing June 1, 1968, the ratio of white to Negro faculty members at each night school will be substantially the same as the ratio of white to Negro faculty members throughout the night-school program."

[8] Trial court rulings pertaining to special efforts to desegregate a new high school were affirmed on appeal.

also rejected the plaintiffs' argument that the trial court should have set a target date for full integration and should have required immediate total desegregation of faculties in several new schools to be opened in 1968.

Judge Thornberry dissented, finding no basis in the record or the prior decisions for modifying the trial judge's experiment in establishing numerical ratios for faculty desegregation. Chief Judge Brown's dissent from the denial of rehearing *en banc* (joined in by Judges Wisdom, Thornberry, Goldberg and Simpson) argued that there was a need for specfic numerical targets for faculty desegregation plans to define the goal of schools unidentifiable as to race, as well as a need for specific target dates for compliance.

## Reasons For Granting the Writ

This case me its plenary review on certiorari because it involves issues of considerable practical importance to the future of school desegregation, about which there is both a conflict among the circuits and an equal division among twelve active judges of the Fifth Circuit. The ruling below also conflicts with this Court's decisions in *Wallace* v. *United States,* 389 U.S. 215, and *Green* v. *County School Board,* 391 U.S. 430.

The case involves the powers of a district court in supervising the transition of a dual, segregated school system into a racially non-discriminatory system as required by *Brown* v. *Board of Education,* 347 U.S. 483 (*Brown I*); 349 U.S. 294 (*Brown II*). The court below set aside an order of the trial court which defines the long range goal for faculty desegregation to be to seek, over an indeterminate period of time, approximately the same proportion of Negro and white teachers in all schools of the system. By

striking the "numerical ratios" from the trial court's order, the panel majority below rejected this goal and left the faculty desegregation objective so vaguely defined as to impair the ability of district courts to assure substantial progress.

In addition to altering the long-term goal, the court below made three subsidiary rulings to which petitioners also object. One was the failure to set any target date or timetable for full faculty desegregation in Montgomery. Another panel of the Fifth Circuit had set a so-called "C" (for "compliance") day for full faculty desegregation by September 1970. *United States* v. *Board of Education of the City of Bessemer, Alabama,* 396 F.2d 44, 52 (5th Cir. 1968). Also the court diluted the trial judge's specific minimum goals for 1968 by adding the qualifying phrases "approximately" and "substantially." Finally, the court below refused the petitioners' request that the trial court be directed to require full faculty desegregation immediately in all newly established schools at the time faculties are first hired and assigned.

The issues should be viewed in the practical context of Montgomery County, Alabama. When this law suit was filed in May 1964, ten years after *Brown I,* the public schools were still totally segregated. No progress had been made voluntarily. In Montgomery, as was true in a Virginia county brought before this Court last term: "Racial identification of the system's schools was complete, extending not just to the composition of student bodies . . . but to every facet of school operations—faculty, staff, transportation, extracurricular activities and facilities." *Green* v. *County School Board,* 391 U.S. 430, 435. As stated in *Green, supra,* at 436, "[t]he transition to a unitary, nonracial system of public education was and is the ultimate end to be brought about . . . ." In Montgomery County, Alabama it became the

task of District Judge Frank M. Johnson, Jr. to supervise that transition.

The very same month this case was filed, this Court declared in *Griffin* v. *School Board,* 377 U.S. 218, 234, that "the time for mere 'deliberate speed' has run out . . . ." Yet, for four more years the District Judge patiently permitted the respondent school board to delay desegregation with a variety of transitional devices until he finally decided "We have reached the point where we must pass 'tokenism.'" (R. 431). The beginning of faculty desegregation had been repeatedly postponed until September 1967, although petitioners sought such relief from the outset of the case. Even after this Court ruled in late 1965 that faculty segregation must be considered in connection with school desegregation plans, in *Bradley* v. *School Board,* 382 U.S. 103, and *Rogers* v. *Paul,* 382 U.S. 198, Judge Johnson felt constrained by a ruling of the Fifth Circuit involving Mobile, Alabama, to delay faculty integration in Montgomery County until 1967 (R. 285). Finally, after four years of litigation, at a 1968 hearing, Judge Johnson warned the school officials that: "I have gone along with this transition business for a good long while, but we have passed the transition period" (R. 544). Judge Johnson entered a faculty desegregation order which demanded specific results in 1968 and clarified the ultimate goal to be pursued by the board. The order was justified by (a) a finding that only slight progress had been made theretofore and the board had not carried out its affirmative obligations under the Constitution,[9] (b) the similarity of the court-imposed requirements to the school authorities' own estimates as to how much faculty integration they could accomplish in

[9] See opinion of the district court at 289 F. Supp. 647, 649-652.

1968,[10] and (c) the school authorities' own expressions of uncertainty about the ultimate goal to be pursued in desegregating faculties.[11]

At an earlier stage (in the June 1, 1967 order) Judge Johnson had defined the goal generally (R. 370):

> The objective of the school system is that the pattern of teacher assignment to any particular school shall not be identifiable as tailored for a heavy concentration of either Negro or white pupils in the school. The school system will accomplish faculty desegregation in a manner whereby the abilities, experience, specialties, and other qualifications of both white and Negro teachers in the system will be, insofar as administratively feasible, distributed evenly among the various schools of the system.

This identical language was approved by this Court when it affirmed a decree in *Wallace* v. *United States*, 389 U.S. 215, affirming *Lee* v. *Macon County Board of Education*,

---

[10] See the testimony of Associate Superintendent Garrett, in the Statement, *supra at* pp. 11-12. Judge Johnson noted his reliance on the board's planning: "What is actually required in the area of faculty desegregation in the high schools for the 1968-69 school year is very little—if any—more than the testimony reflects the school board planned without an additional court order. . . . This also applies to that part of the Court order as now amended requiring faculty desegregation for the other schools in the system. Thus, in the area of faculty desegregation, nothing more is required of the Montgomery County School Board by the order of February 24, 1968, than the law requires as a minimum at this stage of the desegregation process and very little, if any, is required more than the school board, by its testimony, advised this Court it was going to do anyway." (289 F. Supp. at 658.)

[11] Associate Superintendent's Garrett's testimony that he did not know the objectives of the earlier court order beyond a general understanding that "reasonable desegregation of faculty" was required, is quoted extensively in the opinion below. 400 F.2d 1, at 6, note 5.

267 F. Supp. 458, 489 (M.D. Ala. 1967). After this Court's action in *Wallace, supra*, on December 4, 1967, affirmed the objective that faculty assignments not be so arranged as to identify schools as tailored for one race and that teachers be distributed evenly among the various schools, Judge Johnson then entered the more specific order to assure specific results in Montgomery County. The order, which has largely been set aside by the judgment below, further elaborated the theme sounded in the earlier order and in *Wallace, supra*, by stating:

> A. Statement of Objective.
>
> In achieving the objective of the school system, that the pattern of teacher assignments to any particular school shall not be identifiable as tailored for a heavy concentration of either Negro or white pupils in the school, the school board will be guided by the ratio of Negro to white faculty members in the school system as a whole.
>
> The school board will accomplish faculty desegregation by hiring and assigning faculty members so that in each school the ratio of white to Negro faculty members is substantially the same as it is throughout the system. At present, the ratio is approximately 3 to 2. This will be accomplished in accordance with the schedule set out below. (R. 413).

The majority of the panel below eliminated the ratios from the decree, saying that compliance should not be decided solely by reference to the ratios, and that the faculty in a particular school need not mirror the racial composition of the total faculty of the system. In place of the trial judge's relatively precise goals the panel majority substituted only vague generalities about an "ideal racial balance":

> There must be a good faith and effective beginning and a good faith and effective effort to achieve faculty and staff desegregation for the entire system. Although a ratio of substantially or approximately five to one is a good beginning, we cannot say that a ratio of substantially three to two, simply because it mirrors the racial balance of the entire faculty must be achieved as a final objective. (400 F.2d at 8.)
>
> • • •
>
> It is hoped and believed that experience will teach effective ways and means of achieving an ideal racial balance. . . . They [school boards] have the responsibility and should exercise the ingenuity to achieve a proper racial balance. (400 F.2d at 9.)

The vagueness of the majority's generalities about "ideal" and "proper" racial balances inevitably will leave school boards and trial judges in the circuit confused about the ultimate goal. Invariably those officials who resist the progress of desegregation will construe the ruling to justify tokenism which merely alters the all-white or all-black character of a faculty by adding one or two teachers of the other race. The confusion is compounded by the fact that the Fifth Circuit is equally divided, thus leaving the outcome of particular future cases to await the accident of the composition of future panels. We think the point made by Judge Brown's dissent below, about the need for specifics in faculty decrees is irrefutable as a general matter. But the need is even more imperative in Alabama, with its history of official resistance to desegregation, including the attempted intimidation of local school boards by the Governor and State Superintendent of Education to prevent faculty integration. See *Lee* v. *Macon County Board of Education*, 267 F. Supp. 458, 465-470 (M.D. Ala. 1967), aff'd *sub nom. Wallace* v. *United States*, 389 U.S. 215.

Another practical impact of the judgment below is that it signals a cautious, go-slow attitude on faculty integration for trial judges in the circuit, since one of the first district judges in the area to attempt to push a board beyond mere tokenism in faculty integration has been reversed. This plainly will discourage other judges from attempting to formulate detailed goals for school boards to assure faculty integration progress.

Both in its vagueness and in its tendency to delay desegregation, the action below conflicts with this Court's decision in *Green* v. *County School Board*, 391 U.S. 430. *Green* emphasized the needs for action now and for a pragmatic appraisal of desegregation progress. *Green's* requirement is for "a plan that promises realistically to work, and promises to work *now*" (391 U.S. at 439). Both goals are thwarted by the panel's action here. Neither the Montgomery County board, nor the court below, has defined any ascertainable goal toward which progress can be measured now or later.

The decision also conflicts with *Wallace* v. *United States*, 389 U.S. 215, where the *per curiam* order summarily affirmed a decree resting on the same essential idea as the order which has now been set aside. As we read it, the order in *Wallace* (quoted *supra* at 19), covering 99 Alabama counties, calls for a faculty desegregation plan where teachers of differing races and qualifications are "evenly distributed" among the various schools of a system. The order involved here merely defines that objective more precisely.

Judge Johnson's order followed the precedents in other courts, and the action of the Fifth Circuit conflicts with decisions in four other circuits approving faculty desegre-

gation orders requiring that teachers of both races be distributed approximately evenly throughout the systems. See *Dowell* v. *School Board of Oklahoma City,* 244 F. Supp. 971, 978 (W.D. Okla. 1965), aff'd 375 F.2d 158, 164, 167 (10th Cir. 1967), cert. denied, 387 U.S. 931; *Coppedge* v. *Franklin County Board of Education,* 273 F. Supp. 289, 300 (E.D. N.C. 1967), aff'd 394 F.2d 410 (4th Cir. 1968); *United States* v. *School District 151 of Cook County, Illinois,* 286 F. Supp. 786, 798, 800 (N.D. Ill. 1968), aff'd, —— F.2d —— (7th Cir., Dec. 17, 1968), 37 U.S.L. Week 2371. The Eighth Circuit has said that the use of such a formula "comports with *Brown*" in *Kelley* v. *Altheimer School District,* 378 F.2d 483, 498, n. 24 (8th Cir. 1967); *cf. Yarbrough* v. *Hulbert-West Memphis School District,* 380 F.2d 962, 968-969 (8th Cir. 1967).

The *Dowell* case was the first reported case in which a district court required that the percentage of Negro teachers in each school should approximate their percentage in the entire system. It is notable that the percentage formula was first proposed by an expert panel of educators and not by lawyers. The court in *Dowell* made its ruling for the Oklahoma City system on the recommendations of a distinguished panel of educational administrators who devised the integration plan for that city at the court's invitation. The same formula was adopted by Judge Michie in the Western District of Virginia in *Kier* v. *County School Board,* 249 F. Supp. 239, 248 (W.D. Va. 1966), where the court said:

> . . . [t]he order of the court to be entered here envisions no . . . permanent race consciousness. It is merely intended to give redress for former faculty segregation on the premise that, had there been no discrimination to begin with, the Negro teachers employed by the county would have been as evenly distributed through-

> out the various schools in the system as, for want of a better analogy, those teachers with blue eyes or cleft chins.

In conclusion, it ought to be emphasized that the percentage goals adopted by the district court were sufficiently flexible to accommodate administrative difficulties. The goal was not an exact percentage but "substantially the same" ratio. But, if necessary, it would have been unobjectionable to define an area of leeway, as for example was done in *Dowell, supra,* where the court allowed a ten percent margin for individual school variations. *Dowell, supra,* 375 F.2d at 164. Nor did the order import any permanent notion of racial quotas into the school system. Nor did the order mandate that teachers be hired or fired on the basis of race. It merely required that within the context of a system formerly segregated by law where existing employees were about 60% white and 40% black, they be reorganized into a racially integrated pattern among the approximately 50 schools of the system. The mathematical ratios adopted by the court were justifiable as a necessary remedial measure to assure the "disestablishment of state-established segregated school systems," *Raney* v. *Board of Education,* 391 U.S. 443, 449. Approval of the use of such percentages as remedial measures offends no constitutional rule against consideration of racial factors, *United States* v. *Jefferson County Board of Education,* 372 F.2d 836, 876 (5th Cir. 1966), adopted *en banc,* 380 F.2d 385, cert. denied, 389 U.S. 840 (1967); *Wanner* v. *County School Board of Arlington County,* 357 F.2d 452 (4th Cir. 1966).

## CONCLUSION

Wherefore, petitioners respectfully submit that the petition for certiorari should be granted.

Respectfully submitted,

FRED D. GRAY
SOLOMON S. SEAY, JR.
GRAY, SEAY, LANGFORD & PRYOR
352 Dexter Avenue
Montgomery, Alabama 36104

JACK GREENBERG
JAMES M. NABRIT, III
FRANKLIN E. WHITE
ELIZABETH B. DUBOIS
MELVYN ZARR
10 Columbus Circle
New York, New York 10019

*Attorneys for Petitioners*